Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1994

STEPHEN FISHER,

*Petitioner,*

vs.

BENJAMIN FITT, JEFFREY GOLD and BEVERLY DICK,

*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR WRIT OF CERTIORARI

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*Petitioner, Pro Se*

## QUESTIONS PRESENTED FOR REVIEW

1. Is a dangerous precedent established when the Second Circuit violates petitioner's due process rights by rendering decisions that effectively deprive petitioner of an opportunity to be heard on the relevant issues?

2. Should certiorari be granted when recent ambiguous United States Supreme Court opinions have resulted in helplessly complicating a point of law so as to utterly confuse everyone (judges, litigants and scholars alike) regarding the meaning and application of the controlling statutes?

2a. Where there is a question regarding the disqualification of a judge; can "appearance of partiality" as specifically stated in 28 USCS § 455(a) be literally defined in broad terms so that disqualification should result when an objective person would have reasonable suspicions regarding the possibility for impartial and unbiased court deliberations? See *Liteky v. United States*, 510 U.S. 425, 114 S.Ct. 623, 100 LEd2d 474, (1994), Separate Opinion written by Justice Kennedy with whom Justices Blackman, Stevens and Soutter join while concurring with the judgment; and see *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 LEd2d 855 (1988) **OR;** conversely, should the phrase "appearance of partiality" be loosely interpreted to mean that disqualification can only result when a judge's subjective state-of-mind regarding antagonism, prejudice and/or bias would render a fair judgment impossible? See *Liteky, supra.*, 100 LEd2nd at 486-489, Judgment of the Court by Justice Scalia affirming the court of appeals decision.

2b. In the instant action where the judges are also defendants in another unrelated case involving the petitioner, is the proper basis for recusal the unquestionable antagonism, bias and prejudice that any thoughtful person (including judges) must naturally experience when being abruptly placed in an adversarial position as defendants in a legal action?

3. After recognizing issues of fact while denying the respondents' motion to dismiss the complaint; did the Second Circuit err as it ignored the same issues of fact when granting respondents' follow-up motion for summary judgment dismissing the complaint?

## PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

Petitioner Stephen Fisher is appearing pro se. He is not an attorney and has never formally studied law. Petitioner had no assistance during the course of proceedings in this Court or in lower courts.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF AUTHORITIES ..... v

PETITION FOR WRIT OF CERTIORARI ..... 1

DECISIONS BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS AT ISSUE ..... 2

STATEMENT OF CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 4

I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS SUPREME COURT (AND OTHER FEDERAL COURTS) REGARDING THE DUE PROCESS REQUIREMENTS THAT MANDATE A PARTY'S RIGHT TO LITIGATE AN ISSUE BEFORE BEING BOUND BY A PRIOR DETERMINATION OF THAT ISSUE

A. The Second Circuit wrongly ruled that there are no due process guarantees for the petitioner to have an opportunity to respond to the unique issues that the District Court unilaterally and independently created as the basis for its final decision ..... 4

II. THE PETITION SHOULD BE GRANTED TO RESOLVE AMBIGUOUS AND CONFUSING DECISIONS OF THIS SUPREME COURT REGARDING THE REASONS THAT SHOULD FORCE A JUDGE'S DISQUALIFICATION ..... 10

A. The Second Circuit Judges erred as they failed to disqualify themselves when a fair decision would be impossible in circumstances where the Judges' adversarial positions as defendants in another legal action involving the petitioner would naturally produce antagonism, bias and prejudice toward petitioner ..... 10

III. THIS CASE INVOLVES IMPORTANT CONSTITUTIONAL QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT BECAUSE THE PRECEDENT ESTABLISHED BY THE DECISION BELOW THROWS THE DOOR WIDE OPEN TO A WHOLE ARRAY OF NEW CLAIMS REGARDING THE RULES GOVERNING SUMMARY JUDGMENTS AND DUE PROCESS AS SUDDENLY "ISSUES OF FACT" CAN NOW BE UNILATERALLY DETERMINED BY THE PRESIDING JUDGE WHEN RENDERING A DECISION ON A SUMMARY JUDGMENT MOTION .. 15

A. The District Court's final decision forgets that the Court had previously determined that facts describing respondents "coercion" were properly pleaded in the complaint. With the respondents denying that they coerced petitioner — the resulting issue-of-fact as to whether respondents did (or did not) coerce petitioner should have precluded the granting of the Summary Judgment Motion ..... 15

CONCLUSION ..... 18

# TABLE OF AUTHORITIES


Case(s) — Page(s)

*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) ..... 17

*Blonder-Tongue Laboratories v. University of Illinois Found.*, 402 U.S. 313 (1971) ..... 9

*Box v. A & P Tea Co.*, 772 F2d 1372 (7th Cir. 1985) ..... 9

*Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F3rd 516 (5th Cir. 1994) ..... 16

*Friedman v. Rogers*, 420 U.S. 159 (1979) ..... 5

*Heirs of Frudg v. Bld Service*, 506 F2d 841 (5th Cir. 1975) 5

*Harmon v. Superior Court*, 307 F2d 796 (9th Cir. 1962) ..... 9

*Liljeberg v. Heath Services Acquisition Corp.*, 486 U.S. 847 (1988) ..... i, 12, 13

*Liteky v. United States*, 510 U.S. 425 (1994) ..... i, 12, 13, 14

*Munoz v. Intern Alliance*, 563 F2d 295 (5th Cir. 1977) ..... 8

*Pereira v. U.S. Postal Service*, 942 F2d 577 (9th Cir. 1991) ..... 8

*S.J. Groves v. Ohio Turnpike*, 315 F2d 235 (6th Cir. 1963) ..... 17

*Stevens v. Howard Johnson Company*, 181 F2d 390 (4th Cir. 1950) ..... 17

TABLE OF AUTHORITIES - Continued

Page(s)

*U.S. v. Henderson-Durand,* 985 F2d 970 (8th Cir. 1993) .. 16

STATUES AND CONSTITUTIONAL PROVISIONS

United States Code Title 28 section 455(a)..... 12, 13, 14

United States Constitution

Amendment V..... 2, 3
Amendment XIV ..... 2, 3

No._____

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**In The**
**Supreme Court of the United States**
**October Term, 1994**

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**STEPHEN FISHER,**

***Petitioner,***

**vs.**

**BENJAMIN FITT, JEFFREY GOLD and BEVERLY DICK,**

***Respondents.***

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen Fisher respectfully requests that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Second Circuit on the 12th day of October 1994.

## DECISIONS BELOW

The October 12, 1994 decision of the United States Court of Appeals for the Second Circuit (Appendix A) affirmed the District Court's Decision (Appendix C) that granted respondents' motion for summary judgment dismissing complaint.

## JURISDICTION

The opinion of the Court of Appeals was entered on October 12, 1994. (Appendix A) This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AT ISSUE

Amendments V and XIV to the United States Constitution are set forth in Appendix H.

## STATEMENT OF THE CASE

The underlying controversy began with respondents threats aimed at forcing petitioner to pay money he did not owe. The deep-rooted fear of respondents carrying-out their foreboding reprisals ultimately led to petitioner's payment.

Immediately after said payment had ended the terror caused by respondents' ominous threats, petitioner sued respondents in District Court seeking the return of money paid under duress.

In a decision determining that petitioner had, in fact, satisfied all requirements for pleading "coercion", the District Court denied respondents' motion to dismiss complaint. (Appendix D) Thereafter, the respondents submitted a motion for summary judgment which led to a District Court decision that totally ignored the facts, arguments and evidence previously presented during the course of the proceedings. (Appendix C) In essence, acting as if there was no record of the case, the District Court unilaterally and independently created a "State remedy" issue to be the basis for granting the respondents' motion for summary judgment dismissing complaint.

When appealing to Court of Appeals, the petitioner adopted a two-prong strategy. (1st) He argued that the District Court's unilateral, independent actions violated his due process rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution because petitioner was deprived of any opportunity to present evidence (or to be heard) regarding the pivotal State remedies issue that suddenly and without forewarning appeared for the first time in the District Court's final decision. (2nd) Petitioner argued that if issues-of-fact alleging "coercion" were sufficient enough to defeat respondents' motion to dismiss complaint — it would be reasonable to conclude that the same issues of fact, indelibly written into the complaint, would defeat a motion for summary judgment. In an October 12, 1994 decision, the Court of Appeals granted respondents' motion for summary judgment dismissing complaint. (Appendix A)

## REASONS FOR GRANTING THE WRIT

### I

### THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS SUPREME COURT (AND OTHER FEDERAL COURTS) REGARDING THE DUE PROCESS REQUIREMENTS THAT MANDATE A PARTY'S RIGHT TO LITIGATE AN ISSUE BEFORE BEING BOUND BY A PRIOR DETERMINATION OF THAT ISSUE

**A. The Second Circuit wrongly ruled that there are no due process guarantees for the petitioner to have an opportunity to respond to the unique issues that the District Court unilaterally and independently created as the basis for its final decision.**

In its final decision, the District Court clearly explained that a "State remedies" issue was the reason for granting the respondents' motion for summary judgment dismissing the complaint. (Appendix C)

> "Here, the existence of state procedures adequate to remedy the alleged unconstitutional deprivation forecloses [petitioner's] Fisher's due process claim."

Leading-up to the District Court's decision, the official record documenting all the interlocking relationships between petitioner and respondents reveal that none of the parties had considered the State remedies theory to be

credible or plausible. Because the District Court record (prior to the final decision) is absolutely void of any reference to State remedies; such a State remedy argument should not play a role in the decision making process. The Seventh Circuit explained the applicable rule in *Box v. A & P Tea Co.*, 772, 1372, 1374 F2d (1985):

> "True, we may affirm a summary judgment on any ground that finds support in the record [citation omitted], but the ground must have been adequately presented in the trial court so that the non-moving party had an opportunity to submit affidavits or other evidence and contest the issue."

The Appellate Court should have reversed the District Court's decision because any issue injected into a final decision must have been adequately presented during the course of the proceedings, and the parties must have had full opportunity to develop the relevant facts and present supporting evidence. In fact, an issue never raised in the District Court cannot be properly before the appellate court. *Friedman v. Rogers*, 99 S. Ct. 887, 899 n. 20; 420 U.S. 159 LEd2d 100 (1979) In *Heirs of Frudg v. Bld Service*, 506 F2d 841, 844 (1975); the Fifth Circuit Court of Appeals highlighted the legal premise that should have led the Second Circuit Court of Appeals to reverse the District Court's decision in the instant action.

> "The underlying assumption of this proposition is, of course, that the parties had a full and fair opportunity to develop facts relevant to the decision. Where this has not been available, the proper resolution of the appeal is not affirmance but remand."

Following the lead of the District Court, the Court of Appeals (during oral argument) also assumed an adversarial role as it became the opposing force in the controversy, giving full support to the District Court's State remedy issue.

> *The Court:* "Because... Excuse me—because you didn't use them [remedies] in the time the state law sets for you. Is that why they were not available?"
>
> *Petitioner:* "No. No. No, I did not use them because they were not available because of circumstances being the...the..."
>
> *The Court:* "What circumstances?"
>
> *Petitioner:* "The timing of the state attorney's office came in and fought certain...made certain demands in a time that did not let the state... This is nowhere in the record. This is all new stuff."
>
> *Transcript, Appendix G- 3, 4*

> *The Court:* "OK, so that's the dispute... Judge Stanton [in the District Court] thinks you had a remedy and you think you didn't."
>
> *Petitioner:* "No, the court acting in its role said I had a remedy. The defendants never said a remedy..."
>
> *The Court:* "I don't care what the defendants said. The District Court, whose judgment we're reviewing, thought you had a remedy."

*Petitioner:* "...thought I had a remedy?"

*The Court:* "Then, you disagree!"

*Petitioner:* "And they [the District Court] didn't give me a chance to explain why I disagreed."

*The Court:* "OK."

*Petitioner:* "And I'm saying I didn't have an opportunity to be heard."

*Transcript, Appendix G-7, 8*

When all-is-said-and-done, one sentence in the oral argument best exemplifies the lower courts deliberations in the instant case. *Transcript, Appendix G-6*

*The Court:* "I don't care what the defendants said."

Sandwiched between petitioner's opening argument and rebuttal argument, the respondents had a definitive opportunity to express their never heard opinions regarding the Courts' remedies issue. When presented with their time for oral argument in the Court of Appeals, the respondents explained their position regarding the State remedies issue. *Transcript, Appendix G-5*

> "May it please the court. My name is Rebecca Ann Durden and I am an Assistant Attorney General with the New York Department of Law. Our office is waiving oral argument so our appeal will rest on the brief."

But, the respondents' brief makes no mention of State remedies! In retrospect, the respondents' silence was a brilliant strategy as the lower courts were developing and presenting independent, unique "State remedies" arguments to support respondents' motion for summary judgment.

Obviously, in the Court of Appeals arena, confronting the Judges; petitioner found himself "pinned down" in an indefensible no-win situation. On the one hand, the appeals court was asking the petitioner questions about the State remedies issue that suddenly burst into the controversy with the District Court's final decision. On the other hand, the petitioner was prohibited by law to provide (during the appeals process) new evidence (and new facts) that would show that State remedies were never available to him in his particular circumstances.

> "Materials not presented to the District Court for consideration of a motion for summary judgment are never properly before the reviewing court on an appeal from the judgment granting the motion."
>
> *Munoz v. Intern, Alliance of Thea. Stage Emp., Etc.*, 563 F2d 295, 298 (5th Cir. 1977)

In a similar case that also focused on a District Court dismissing a complaint based on the Court's independent conclusion that the petitioner possessed other remedies — the Ninth Circuit Appellate Court in *Periera v. U.S. Postal Service*, 942 F2d 577, 578 (9th Cir. 1991) recognized appellant's due process rights to be heard on the remedy issue (as the Court of Appeals reversed the District Court's decision).

> "The infirmity in this case on this [remedy] issue stems not from the substance of the District Court's ruling regarding exhaustion but from the peremptory manner in which the issue was handled and the ruling made. ... The Court had no briefing from Periera [plaintiff/appellant] on this [remedy] issue nor did it hear argument. ... We are compelled to remand this [remedy] issue to the District Court to give [plaintiff] Pereira an opportunity to present his argument...".

Before the rendering of judgment, the right to respond to the issues and arguments that are involved in the litigation is the essence of due process, and nothing whatsoever can justify by-passing that right. *Harmon v. Superior Court*, 307 F2d 796, 798 (9th Cir. 1962) In this instant action, petitioner was entitled to be heard on the District Court's "State remedy" issue. As this court clearly explained in *Blonder-Tongue Laboratories v. University of Illinois Found.*, 402 U.S. 313, 329, 91 S. Ct. 1434, 1443, 28 L.Ed.2d 788 (1971) — because petitioner had no opportunity to present new evidence or be heard, the lower courts' decisions should be reversed as petitioner was clearly denied his due process rights.

> "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore never had an opportunity to be heard."

II

## THE PETITION SHOULD BE GRANTED TO RESOLVE AMBIGUOUS AND CONFUSING DECISIONS OF THIS SUPREME COURT REGARDING THE REASONS THAT SHOULD FORCE A JUDGE'S DISQUALIFICATION

### A. The Second Circuit Judges erred as they failed to disqualify themselves when a fair decision would be impossible in circumstances where the Judges' adversarial positions as defendants in another legal action involving the petitioner would naturally produce antagonism, bias and prejudice toward petitioner.

By relying on his professional expertise as a statistician and computer programmer dealing with building mathematical probability models — early in petitioner's Second Circuit Court of Appeals experience, he came to realize that irrefutable statistics must lead to the unqualified conclusion that guidelines and procedures utilized in the Second Circuit Court of Appeals created a two-tier legal process that was clearly discriminatory against anyone who could not afford to hire an attorney.

Official Second Circuit Court of Appeals statistics (Appendix F) establish that in 1992, a total of 4,165 cases were filed of which 1,048 were pro se filings. Based on these actual Court records, a steady trend of increased annual filings would lead to conservative, realistic projections of approximately 40,000 Second Circuit Court of Appeals cases filed during the most recent decade of which about 10,000 were pro se filings. For the past ten years, not a single Second Circuit Court of Appeals plaintiff was ever provided

more than five minutes oral argument time although the official word-of-mouth Court policy has always been that allotment of oral argument time is based on the merits and intricacies of each case. While there is a 1-in-943 chance that no pro se case filed in 1992 warranted an over five minutes oral argument — for the past decade, there is a 1-in-3,424,897 chance that no pro se case had the merits warranting the allotment of over five minutes for oral argument. That is, somebody has a better chance of being struck by lightning than appearing pro se and being awarded more than five minutes oral argument time in the Second Circuit Court of Appeals. About 3-in-4 attorneys who request more than five minutes oral argument time are allotted more than five minutes. The conclusion is quite simple — having enough money to hire an attorney is the first, all powerful requisite for being awarded more than five minutes oral argument time in the Second Circuit Court of Appeals. Petitioner's request for more than five minutes oral argument was rejected with a single word ("denied") from the Court of Appeals.

Furthermore, the Second Circuit Court of Appeals' Rule 33 is discriminatory on its face. (Rule 33 is set forth in Appendix E) Rule 33 describes the benefits that can result from the parties participating in a prehearing conference (example: ". . . simplification of the issues . . . that may aid in the disposition of the proceeding"). Yet, Rule 33 starts-out by limiting this important court procedure only to litigants who can afford an attorney by stating: "The Court may direct attorneys for parties . . .". In the Second Circuit Court of Appeals, a prehearing conference is scheduled for every attorney who requests it. A prehearing conference has never been conducted for any litigant who did not have an attorney. As with many of the 10,000 pro se plaintiffs who, in the past decade, entered the Second Circuit Court of Appeals in search of fair, equal justice; the Court rejected

petitioner's request for a prehearing conference because petitioner could not afford an attorney.

The petitioner, not seeking any monetary damages, launched a civil rights, class action lawsuit in the Ninth Circuit District Court with the sole objective being to end the Second Circuit Court of Appeals discriminatory practices.[1]

When petitioner filed his Ninth Circuit District Court civil rights lawsuit, the Second Circuit Court of Appeals oral argument in the instant action had not yet been scheduled. It did not take a great deal of imagination for petitioner to conclude that he was confronting an untenable situation where the people he had accused of discrimination in his Ninth Circuit District Court case were the same people who would be acting as judges in the Second Circuit Court of Appeals. Petitioner's search for fair and equal justice had undoubtedly produced an antagonistic and biased environment in the Second Circuit Court of Appeals.

While pro se petitioner's inexperience and ignorance resulted in a motion for change of venue (instead of a motion for disqualification); the ramifications lead to the same unmistakable conflict arising from two contrasting interpretations of 28 USCS § 455(a) found in *Liteky v. United States*, 510 U.S. 425, 114 S.Ct. 425, 100 LEd2d 474 (1994) where Justice Scalia, writing the opinion of the Court, provided a radically different interpretation of the statute than Justice Kennedy who wrote a second opinion (joined by Justice Blackman, Stevens and Soutter). Both opinions concurred in affirming the Court of Appeals decision.

In most circumstances, the normal thinking would lead

[1] Petitioner's residence is in Northern California, the jurisdiction of Ninth Circuit Federal Court.

a legal reviewer to follow the guidelines established by the "decision of the Court". But, the justices' clashing opinions brought to the surface two undeniable realities: (1st) the "decision of the Court" interpreted the wording to mean something different and beyond what was stated by the particular language of the statute; and (2nd) in another, most recent "decision of the Court"; it was determined that Judge Kennedy's second opinion's statute interpretation in the *Liteky, supra.* case was, in fact, the opinion of the Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 US 847, 108 S Ct 2194, 100 LEd 2d 855 (1988). The *Liljeberg, supra* decision by Justice Stevens was joined by Justices Brennan, Marshall, Blackman and Kennedy. This confusing discord among the justices is best described by Justice Kennedy writing his second opinion in *Liteky, supra.*, 100 LEd 2nd at pages 493, 496, 497, 497 respectively.

> "But the Court [Justice Scalia's decision] proceeds to discern in the statute an extra-judicial source interpretative doctrine, under which the source of an alleged deep-seated predisposition is a primary factor in analysis."
>
> "Disqualification is required if an objective observer would entertain reasonable questions about a judge's impartiality.
>
> "As I [Justice Kennedy] noted above, the central inquiry under § 455(a) is the appearance of partiality, not its place or origin.
>
> "The Court's standard [in Justice Scalia's decision], in contrast asks whether fair

> judgment is impossible, and if this test demands some direct inquiry to the judge's actual, rather than apparent, state of mind, it defeats the underlying goal of § 455 (a): to avoid the appearance of partiality even when no partiality exists."

Further, Justice Kennedy explained the inescapable problem with the decision of the Court's *"state of mind / impossible"* standard: "And, in all events, the 'impossibility of a fair judgment' standard remains troubling due to its limited, almost preclusive character." *Liteky, supra.*, 100 LEd 2nd at 496

In the instant action, certiorari should be granted for three explicit reasons: (1st) to clear-up the puzzling inferences and conflicting requirements that now exist because of the Supreme Court's contradictory interpretations of 28 USCS § 455(a); (2nd) to solve the perplexing question produced by the *Liteky, supra.* decision that determined the basis for disqualification was a judge's state-of-mind that would make it impossible to render a fair judgment (but failed to explain how such nebulous "state of mind" determinations should be made); and (3rd) to eliminate the antagonism, bias, prejudice that most definitely developed in the Second Circuit Court of Appeals where the judges were also defendants in another case involving the petitioner.

III

## THIS CASE INVOLVES IMPORTANT CONSTITUTIONAL QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT BECAUSE THE PRECEDENT ESTABLISHED BY THE DECISION BELOW THROWS THE DOOR WIDE OPEN TO A WHOLE ARRAY OF NEW CLAIMS REGARDING THE RULES GOVERNING SUMMARY JUDGMENTS AND DUE PROCESS AS SUDDENLY "ISSUES OF FACT" CAN NOW BE UNILATERALLY DETERMINED BY THE PRESIDING JUDGE WHEN RENDERING A DECISION ON A SUMMARY JUDGMENT MOTION

**A. The District Court's final decision forgets that the Court had previously determined that facts describing respondents "coercion" were properly pleaded in the complaint. With the respondents denying that they coerced petitioner — the resulting issue-of-fact as to whether respondents did (or did not) coerce petitioner should have precluded the granting of the summary judgment motion.**

The respondents first made a motion to dismiss complaint partly based on their claim that there were no triable issues of fact. In rejecting the motion to dismiss complaint, the District Court determined in its decision (Appendix D):

> "The alleged acts of coercion were the letters sent from defendant Beverly Dick in Albany to [plaintiff] Mr. Fisher in Manhattan."

Thereafter, the District Court granted respondents' motion for summary judgment dismissing complaint while stating in the "conclusion" to its final decision (Appendix C):

> "Fisher has failed to demonstrate that there is any genuine issue of fact requiring trial."

The Court conspicuously failed in its final decision to explain how (or when) the "coercion" issues-of-fact had suddenly disappeared during the short period of time between the respondents' two motions. But, the Court's first determination that petitioner did allege "coercion" collides with respondents position that they never coerced petitioner. The District Court erred because whether the defendants actually coerced the petitioner is a clear-cut issue of fact requiring a trial. *Brown & Root, Inc. v. Louisiana State AFL-CIO,* 10 F3rd 516, 521 (5th Cir. 1994); *U.S. v. Henderson-Durand,* 985 F2d 970, 973, n. 4 (8th Cir. 1993)

The underlying source of the alleged "coercion" was respondents' claim that petitioner owed money — conversely, petitioner claims he did not owe respondents money.

In his Court of Appeals oral argument (Appendix G-6), the petitioner focused on the critical "did he owe" (or, "did he not owe") issue-of-fact by explaining his submission (in District Court) of irrefutable evidentiary documentation that unmistakably established that plaintiff did not owe the money.[2]

> **Petitioner:** I didn't owe the money, but I paid it. And that... that is an issue-of-fact. Their

[2] The petitioner annexed to his complaint a scientific analysis from one of the world's most respected laboratories plus standard industry-wide pricing data to support his allegations that money was not owed.

> [respondents] position is, I owed them money. I had specific evidence submitted to the court—it wasn't anything conclusorary. I had specific evidence. I said, I do not owe this money and here is why I don't owe this money. And here is documentary evidence saying I do not owe this money. And I paid it. I paid it strictly out of fear.

Summary judgment should not be granted where there is a conflict as to the meaning, purpose and inference of the facts. *S. J. Groves v. Ohio Turnpike,* 315 F2d 235, 238 (6th Cir. 1963) Whether respondents truly "coerced" petitioner and/or whether petitioner truly owed money were issues-of-fact that should have led to a denial of the respondents' motion for summary judgment because the existence of a single issue-of-fact precludes a summary judgment.[3] *Stevens v. Howard Johnson Company,* 181 F2d 390, 394 (4th Cir. 1950) (reversing a grant of summary judgment) After experiencing rejection of their motion to

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[3] Beyond the "coercion" and "money owed" questions, there were various secondary issues-of-fact involved with the lower court's deliberations. The most bewildering question emerged from a defendants' disagreement among themselves. During oral argument, the plaintiff explained an extraordinary sequence-of-events where respondents could not supply credible reasons as to why plaintiff supposedly owed money. *(Transcript, Appendix G-6):*

> **Petitioner Fisher:** It even further got complicated... One defendant stated in a letter to me, 'You owe money, but it is not for reproduction costs.'
>
> **The Court:** It's for something else?
>
> **Petitioner Fisher:** ... The attorney for the defendants then wrote a letter to the judge of the Lower [District] Court and said, 'This money was for reproduction costs.' So, I really don't even know what it's for and the Court can't know what it's for based on the documents it has before them [the Court]. Where there are issues-of-fact, where there are conflicts of claims, where there are questions as to credibility, a summary judgment should not be granted.

dismiss complaint (because the Court established respondents alleged "coercion"); the respondents' entire argument in support of their follow-up motion for summary judgment was that their actions were honest and legal — the District Court, not the respondents, claimed that there were no issues — the District Court's decision should have been reversed because the burden is on the moving party to show that there is no genuine issue as to any material fact. F.R.C.P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598; 26 LEd2 142 (1970)

In the instant case, only one truism survives — the respondents possess the petitioner's money. And, based on the conflicting evidence, nobody could possibly know whether plaintiff owed the money. In the final analysis, whether petitioner owed money and/or whether respondents "coerced" petitioner are clear-cut issues-of-fact that should have defeated any motion for summary judgment.

## CONCLUSION

Petitioner respectfully urges this Court to grant the petition for writ of certiorari.

DATED: December 5, 1994

Respectfully submitted,

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*Petitioner, Pro Se*

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of October, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE JON O. NEWMAN
Chief Judge.
HONORABLE JOHN M. WALKER,
HONORABLE GUIDO CALABRESI,
Circuit Judges.

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STEPHEN FISHER,
Plaintiff-Appellant

v.

BENJAMIN FITT, JEFFREY GOLD, and BEVERLY DICK,
Defendants-Appellees.

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UNITED STATES COURT OF APPEALS
FILED
OCT 12 1994
GEORGE LANGE III, CLERK
SECOND CIRCUIT

93-9354

ORDER

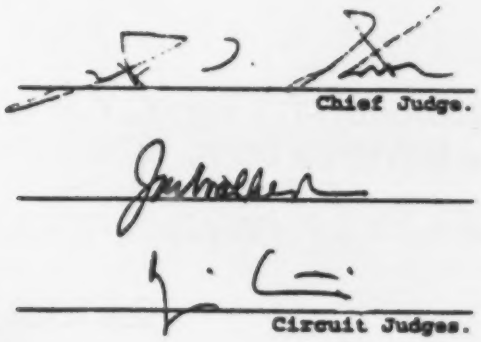
Appeal from the United States District Court for the Southern District of New York (Louis L. Stanton, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel for appellees, and appellant pro se.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Stephen Fisher appeals pro se from the November 5, 1993 judgment of the District Court, dismissing, on motion for summary judgment, his suit against two lawyers and a paralegal in the office of the New York Attorney General. Fisher sued alleging constitutional violations arising from the action of the defendants in collecting $152 in costs. Costs had been awarded by the New York Court of Appeals in a June 4, 1992, decision. Fisher contends that costs should not have exceeded $100.

The claim of constitutional violations is entirely frivolous, for reasons fully set forth in the memorandum endorsement of Judge Stanton.




N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

**APPENDIX B**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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STEPHEN FISHER,

Plaintiff,

-against-

92 *CIVIL* 9133 (LLS)
*JUDGMENT*

BENJAMIN FITT, JEFFREY GOLD,
BEVERLY DICK,

Defendants.

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92 ***CIVIL*** 9133 (LLS) ***JUDGMENT***

Defendants having moved for summary judgment pursuant to Rule 56, F.R.Civ.P., and the said motion having come before the Honorable LOUIS L. STANTON, U.S.D.J., and the Court thereafter on November 3, 1993, having handed down its memorandum endorsement; entitling defendants to judgment as a matter of law, and directing the Clerk of the Court to dismiss the complaint, with costs and disbursements to the defendants according to law, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed, with costs and disbursements to defendants according to law.

DATED: NEW YORK, NEW YORK
November 4, 1993

# APPENDIX C

## MEMORANDUM ENDORSEMENT

Steven Fisher v. Benjamin Fitt, et al., 92 Civ. 9133 (LLS).

Plaintiff Stephen Fisher alleges violations of the Fourth and Fifth Amendments by defendants, employees of the Civil Recoveries Bureau of the New York State Department of Law. The alleged violations occurred in the course of defendants' collection of $152.00 taxed against Fisher by the Clerk of the New York State Supreme Court Appellate Division, Third Department. The sum was taxed on June 29, 1992, which denied Fisher's motion for leave to appeal and awarded "one hundred dollars costs and necessary reproduction disbursements." Fisher disputes $52.00 taxed by the clerk; he alleges that defendants' coercion and intimidation caused him to pay the full amount, thereby depriving him of property without due process of law.

Defendants Benjamin Fitt, Jeffrey Gold, and Beverly Dick move for summary judgment pursuant to Fed. R. Civ. P. 56 (b). For the purpose of this motion, the complaint of Fisher, appearing pro se, must be construed liberally. See Haines v. Kerner, 404 U.S. 519, 520-21, S. Ct. (1972). Therefore, this court will treat Fisher's application as alleging claims under the Fourth, Fifth, and Fourteenth Amendments and 42 U.S.C. § 1983.

1. Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). "Summary judgment is appropriate when, after drawing all reasonable inferences in

favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the nonmoving party." Lund's Inc. v. Chemical Bank, 870 F. 2d 840, 844 (2d Cir. 1989). If a motion for summary judgment is properly supported, "the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e) ).

2. The crux of Fisher's claims is that defendants violated his constitutional rights by collecting more than was authorized by the Court of Appeals. The Court of Appeals awarded "one hundred dollars costs and necessary reproduction disbursements." The bill of costs, as taxed by the clerk, charges $100.00 as "Motion costs," and $52.00 as "Motion expenses." Fisher contends that although the Court of Appeals awarded reproduction disbursements it did not award "Motion expenses," and thus the $52.00 charge was not authorized by the Court's order, rendering its inclusion in the bill of cost erroneous, and defendants' collection of the $52.00 charge by threats of enforcement proceedings a deprivation of property without due process.

Whether the costs were taxed against Fisher with notice, pursuant to N.Y. Civ. Prac. L. & R. ("C.P.L.R.") § 8402, or without notice, pursuant to C.P.L.R. § 8403, New York law provides a clear remedy for a facially erroneous bill of costs. If the costs were taxed with prior notice to Fisher, he could have objected to the $52.00 charge before the clerk, at the time of taxation. If the costs were taxed without notice, Fisher could have sought retaxation of the disputed $52.00 charge. Section 8403 provides:

> A party who has taxed costs without notice shall immediately serve a copy of the bill of costs upon each party who is entitled to notice under section

> 8402. Within five days after such service, any such party may serve notice of retaxation of costs upon five days' notice to the party who has taxed the costs, specifying the item as to which retaxation is sought.

Moreover, pursuant to C.P.L.R. § 8404, Fisher could have sought judicial review of the costs as taxed by the clerk: "[u]pon motion of any interested party, on notice, the court may allow or disallow any items objected to before the clerk; or it may order retaxation before the clerk and it may specify the grounds or the proof upon which an item may be allowed or disallowed."

In the context of a procedural due process claim, such as that alleged by Fisher, the Supreme Court has stated:

> [T]he deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon v. Burch, 494 U.S. 113, 125-26, 110 S.Ct. 975, 983 (1990) (citations and footnotes omitted) (emphasis in original). Here, the existence of state procedures adequate to

remedy the alleged unconstitutional deprivation forecloses Fisher's due process claim. See Parrett v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) , overruled in part on other grounds, Daniels v.Williams, 474 U.S. 327, 106 S.Ct. 662 (1986) ; Campo v. New York City Employees' Retirement Sys., 843 F. 2d 96 (2d Cir.) , cert. denied, 488 U.S. 889 , 109 S.Ct. 220 (1988) ; Alfaro Motors, Inc. v. Ward, 814 F.2d 883 (2d Cir. 1987) ; Giglio v. Dunn, 732 F.2d 1133 (2d Cir.) , cert denied, 469 U.S. 932, 105 S.Ct. 328 (1984). Moreover, it is immaterial whether these state procedures remain presently available to Fisher. See Campo, 843 F.2d at 102 n.6; Giglio, 732 F.2d at 1135 n.1.

Conclusion

Fisher has failed to demonstrate that there is any genuine issue of material fact requiring trial. Defendants are entitled to judgment as a matter of law.

The Clerk is directed to dismiss the complaint, with costs and disbursements to defendants according to law.

So ordered.

Dated: November 3, 1993
New York, New York

Louis L. Stanton

LOUIS L. STANTON
U.S.D.J

# APPENDIX D

## MEMORANDUM ENDORSEMENT

Stephen Fisher v. Benjamin Fitt, et al., 92 Civ. 9133 (LLS).

Defendants Benjaimin Fitt and Jeffrey Gold move to dismiss or transfer this case to the United States District Court for the Northern District of New York, for improper venue.

Plaintiff Stephen Fisher alleges that defendants coerced and intimidated him into paying $152.00 in court costs, when they were only entitled to $100.00. The alleged acts of coercion were letters sent from defendant Beverly Dick in Albany to Mr. Fisher in Manhattan. The alleged coercive effect and ultimate payment of the money occurred in Manhattan, and Mr. Fisher's money order was mailed from Manhattan. Accordingly, a "substantial part of the events or omissions giving rise to the claim" occurred this District. 28 U.S.C. § 1391.

The motion to dismiss or transfer is denied.

So ordered.

Dated: March 11, 1993
New York, New York

Louis L. Stanton

LOUIS L. STANTON
U.S.D.J

# Appendix E

**Rule 33. Prehearing Conference.**

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

# Appendix F

Table 1
SECOND CIRCUIT COURT OF APPEALS
Years ending September 30th.

| | 1991 | 1992 | Change |
|---|---|---|---|
| Private Civil | | | |
| Filed | 1320 | 1680 | 27.3% |
| Terminated | 1416 | 1516 | 7.1% |
| Pending | 384 | 548 | 42.7% |
| U.S. Civil * | | | |
| Filed | 351 | 379 | 8.0% |
| Terminated | 356 | 363 | 2.0% |
| Pending | 97 | 113 | 16.5% |
| Bankruptcy | | | |
| Filed | 113 | 109 | -3.5% |
| Terminated | 110 | 102 | -7.3% |
| Pending | 45 | 52 | 15.6% |
| Administrative Agency | | | |
| Filed | 265 | 253 | -4.5% |
| Terminated | 222 | 284 | 27.9% |
| Pending | 110 | 79 | -28.2% |
| Original Proceedings | | | |
| Filed | 45 | 44 | -2.2% |
| Terminated | 42 | 38 | -9.5% |
| Pending | 7 | 13 | 85.7% |
| Prisoner Petitions | | | |
| Filed | 655 | 834 | 27.3% |
| Terminated | 732 | 717 | -2.0% |
| Pending | 194 | 311 | 60.3% |
| Criminal | | | |
| Filed | 789 | 866 | 9.8% |
| Terminated | 879 | 875 | -0.5% |
| Pending | 445 | 436 | -2.0% |
| Total | | | |
| Filed | 3538 | 4165 | 17.7% |
| Terminated | 3757 | 3895 | 3.7% |
| Pending | 1282 | 1552 | 21.1% |

* Appeals in which the United States is a party.

United States Court of Appeals
Second Circuit Clerk's Office
Individual Pro Se Filings Analysis
October 1, 1991 - September 30, 1992
Run Date: 05/03/94

| | | |
|---|---|---|
| rvw | agency petition for review | 19 |
| rvw tax | agency petition for review-tax court | 8 |
| dc | bankruptcy appeal from district court | 11 |
| P | criminal pre-sentencing guidelines | 21 |
| S | criminal sentence | 17 |
| V | criminal conviction | 6 |
| Z | criminal sentence & conviction | 26 |
| pri | civil private | 260 |
| us | civil United States | 79 |
| extra | | 2 |
| mand | original proceeding mandamus | 60 |
| proh | original proceeding prohibition | 1 |
| fed 2255 | prisoner federal 2255 | 103 |
| fed cvrgt | prisoner federal civil rights | 20 |
| fed hc | prisoner federal habeas corpus | 16 |
| fed oth | prisoner federal other | 9 |
| state2255 | prisoner state 2255 | 1 |
| statecvrgt | prisoner state civil rights | 224 |
| statehc | prisoner state habeas corpus | 162 |
| stateoth | prisoner state other | 3 |

total cases reported: 1048

## APPENDIX G

**ORAL ARGUMENT *EXPLANATION:*** Using an in-court recording system, the Second Circuit Court of Appeals records oral arguments on audio cassettes. Parties can purchase these cassettes from the Court. The Court clerk advised petitioner that petitioner's 5-minutes oral argument spanned two tapes. Although petitioner paid the required price (and although petitioner has repeatedly asked for all relevant cassettes); the Second Circuit provided only one tape covering the 2nd part of petitioner's oral argument. Thus, the below transcript abruptly starts in the middle of petitioner's oral argument. Of course, all references in the brief only correspond to this last segment of the petitioner's Court of Appeals appearance. The first part of petitioner's oral argument remains shrouded in mystery.

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## ORAL ARGUMENT - October 11, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York.

PRESENT: HONORABLE JON O. NEWMAN
Chief Judge.
HONORABLE JOHN M. WALKER,
HONORABLE GUIDO CALABRESI,
Circuit Judges.

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STEPHEN FISHER,
Plaintiff-Appellant

v. 93-9354

BENJAMIN FITT, JEFFREY GOLD,
and BEVERLY DICK,
Defendants-Appellees.

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***Appearances:*** Stephen Fisher, plaintiff pro se; Rebecca Ann Durden, attorney for defendants

**The Court:** ...go and get the money. I don't care whether it's fifty-two dollars or fifty-two thousand dollars. The question is: can you go and get that money or are you...think you have a right to get it against the state?

**Plaintiff Fisher:** No, I can not do that because the time limits had expired. When he made his motion... When he made his statement, my time limits to make any claims for... counter-claims had expired.

**The Court:** But not, not...

**Plaintiff Fisher:** The decision was made and I had no opportunity to bring in rebuttal.

**The Court**: But, again, if you had that opportunity... If you had that opportunity to go before the state—nobody had to tell you that. It was your responsibility to find that you had an opportunity to go to the state.

**Plaintiff Fisher:** But I didn't! That's...that's the whole point.

**The Court**: But why, if you...?

**Plaintiff Fisher:** If I had the opportunity, I could have, but I didn't have the opportunity. But the decision was made saying that I did and I had no opportunity to give rebuttal on that. I had no opportunity to be heard. It wouldn't... The defendant's story...

**The Court:** I'm confused. You say you never had an opportunity to go before the state?

**Plaintiff Fisher:** I never had an opportunity...

**The Court:** I'm not talking about you personally, I'm talking about "a person" who is put in this position. Do they have an opportunity to go before the state?

**Plaintiff Fisher:** No! There was no... In my particular circum...

**The Court:** That's because you hadn't availed yourself of the procedures in this state.

**Plaintiff Fisher:** That is not correct. I never had an opportunity to explain before the law why those procedures were not applicable to me. And I don't think this is the point for me to explain, either.

**The Court**: Tell us why they're not applicable to you.

**Plaintiff Fisher:** They were not applicable because it was... The...after this, it was a timing situation that they were just simply not available. The timing situation...

**The Court**: You didn't... You didn't...

**Plaintiff Fisher:** I...

**The Court**: Because... Excuse me—because you didn't use them in the time the state law sets for you. Is that why they were not available?

**Plaintiff Fisher:** No. No. No, I did not use them because they were not available because of circumstances being the...the...

**The Court**: What circumstances?

**Plaintiff Fisher:** The timing of the state attorney's office came in and fought certain...made certain demands in a time that did not let the state... This is nowhere in the record. This is all new stuff. This is... This...I didn't come in to debate this. This is nothing in the record we're talking about here. We're creating an argument here that should have been done in the court. The lower court... My whole point is, you just...

**The Court**: We just want to know what you mean when you say "something's not available to you." It's not a hard question.

**Plaintiff Fisher:** Well, something wasn't available to me. I wasn't allowed the opportunity to present this argument in the court.

**The Court**: And what prevented you?

**Plaintiff Fisher:** Because it was a final decision. I had to appeal it, which I did, saying, "I want to go into court..".

**The Court**: That's what prevented you.

**Plaintiff Fisher:** ...and they... And I want to go into court and I want to tell why those remedies were not available to me. That I had a right to be heard. I didn't want a decision being made where I can not respond to it and that's what happened in the lower court.

**The Court**: And that's your explanation?

**Plaintiff Fisher:** Pardon? That is...that is one of the thrusts of it.

**The Court**: OK. Fine. All right. Your time is up. We'll hear the other side.

**Defendants' Attorney Durden:** May it please the court. My name is Rebecca Ann Durden and I'm an Assistant Attorney General with the New York State Department of Law. Our office is waiving oral argument so our appeal will rest on the brief.

**The Court**: All right. You're certainly entitled to do that. All right, that means your rebuttal time is available right now, Mr. Fisher.

**Plaintiff Fisher:** Thank you. There also were issues of fact that were not ever considered in the lower court. The critical issue of that comes to the light with the defendants' claim that I owed money. My... Conversely, my claim is that I owed no money. This critical issue of fact is further complicated by...

**The Court:** Did they collect it from you?

**Plaintiff Fisher:** What? Of course! They threatened me...

**The Court:** Did they collect it from you?

**Plaintiff Fisher:** Absolutely!

**The Court:** Did they collect it?

**Plaintiff Fisher:** Yes!

**The Court:** You paid it out?

**Plaintiff Fisher:** I paid it. Absolutely! They said...

**The Court:** You're out... You're out that money?

**Plaintiff Fisher:** Yes! I paid it. They said if I did not pay the money, they were going to seize my assets, they were going to do whatever they do against my salary. They were going to start proceedings and I paid the money. I didn't owe the money, but I paid it. And that...that is an issue of fact. Their position is, I owed them money. I had specific evidence submitted to the court—it wasn't anything conclusorary. I had specific evidence. I said, 'I do not owe this money and here is why I don't owe this money. And here is documentary evidence saying I do not owe this money.' And I paid it. I paid it strictly out of fear. I wasn't going to not pay it and suffer.

**The Court**: Mm, hm. All right.

**Plaintiff Fisher:** It even further got complicated because one of the... When the defendants presented their papers, the defendant for the... One defendant stated in a letter to me, 'You owe money, but it is not for reproduction costs.'

**The Court:** It's for something else?

**Plaintiff Fisher:** It was for something... It was for office expenses. The attorney for the defendants then wrote a letter to the judge of the lower court and said, "This money was for reproduction costs." So, I really don't even know what it's for and the court can't know what it's for, based on the documents it has before them. Where there are issues of fact, where there are conflicts of claims, where questions as to credibility, a summary judgment motion should not be granted.

**The Court:** And the court in which these costs, whatever they were, had been assessed—you didn't go into that court to straighten this out—you came into Federal District Court, instead. Right?

**Plaintiff Fisher:** I tried. I tried. Like any human being would feel—you call up and say, "You made a mistake." And they said, "Tough. Forget it."

**The Court:** And the district court... And the district court said, "You just went into the wrong court. You should have... When you're fighting about the amount of costs, however labeled, that are assessed by a state court, you go into state court and argue about it.

**Plaintiff Fisher:** That's not what they said! They said I had state remedies. And I said, they are not there. We're going back to the same thing. I didn't have... I never had...

**The Court:** OK, so that's the dispute... Judge Stanton thinks you had a remedy and you think you didn't.

**Plaintiff Fisher:** No, the court acting in its role said I had a remedy. The defendants never said "a remedy"... .

**The Court:** I don't care what the defendants said. The district court, whose judgment we're reviewing, thought you had a remedy.

**Plaintiff Fisher:** ...thought I had a remedy?

**The Court:** Then, you disagree!

**Plaintiff Fisher:** And they didn't give me a chance to explain that I disagreed.

**The Court:** OK.

**Plaintiff Fisher:** And I'm saying I didn't have an opportunity to be heard.

**The Court:** I think we understand your point. We'll reserve decision. Thank you both.

## Appendix H

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

- Amendment V
- Amendment XIV (Section 1)

**AMENDMENT V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT XIV

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.